UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ADMINISTRATIVE LAW JUDGE BENJAMIN GREEN

TRADE OFF, LLC

Case Nos. 02-CA-199415
02-CA-205658
02-CA-212872

and

CONSTRUCTION AND GENERAL
BUILDING LABORERS LOCAL 79

TRADE OFF LLC, and TRADE OFF PLUS, LLC
AS SINGLE AND/OR JOINT EMPLOYERS

and

Case No. 02-CA-207414

CONSTRUCTION AND GENERAL
BUILDING LABORERS LOCAL 79

POST-HEARING MEMORANDUM OF CONSTRUCTION AND GENERAL BUILDING LABORERS LOCAL 79

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INTRODUCTION

Intervenor Construction and General Building Laborers Local 79 ("Local 79" or the "Union") respectfully submits this Memorandum in support of the General Counsel's case against the Respondent Employers Trade Off, LLC and Trade Off Plus, LLC (the "Employer", "Company" or "Trade Off").

The Consolidated Complaint in these cases effectively involves four different factual scenarios, with respect to all of which the General Counsel established facts more than sufficient to warrant the ALJ issuing a recommended order sustaining the claims.

A. The Cases at Issue.

1. Jamison and Pimentel Cases.

Paragraph 11 of the Consolidated Complaint presents the allegations specifically relevant to the cases of Darrell Jamison and Ricardo Pimentel, two former Trade Off employees who after leaving the Company issued brief public statements about their experience, in retaliation for which Trade Off sued them for defamation. As explained below, Trade Off did not even offer a witness to testify as to the grounds it maintained for bringing the defamation suit. The suit expressly targets Jamison's and Pimentel's public statements about their negative experience working for the Company; that is—the defamation complaint expressly targets protected conduct. The Company's effort at a defense—to the extent it mounted any—was simply to claim the workers spoke untruthfully. It failed at that. But more importantly, the Company took aim at a straw-man because establishing that the employees spoke inaccurately would not have provided a basis for bringing claims of defamation against them.

To maintain a legal basis for a defamation case, Trade Off needed grounds for believing the employees spoke maliciously and that their statements caused the Company special damages. At the hearing, Trade Off simply ignored those relevant bases for bringing the complaint. In other words—it didn't even try to establish a basis for the lawsuit.

Trade Off clearly violated *Bill Johnson's Restaurant*, 461 U.S. 731 (1983), and its progeny by suing the two workers.

2. Riccie Haneiph Case.

Riccie Haneiph was a Trade Off employee who on July 18, 2017 posted on Local 79's Facebook page that he was glad to see other employees were protesting the Company because Trade Off was definitely "unfair". GC Exs. 10 and 16. He never worked again. The Company's proffered defense is that Haneiph had previously showed up to a job site without work boots and had been fired *for that*, not because of his subsequent posts on Facebook. That account is clearly wrong.

The Company had no records showing that Haneiph had been terminated at the time of the Facebook post, or for that matter—*at any time*. To the contrary, *after* the date on which Trade Off claims it had fired him, it provided him a letter *confirming his employment*. GC Ex. 9. It also contested his claim for unemployment on the grounds that he had quit (GC Ex. 38), claiming *the Facebook post* as evidence of the quit. GC Ex. 37. The Employer's first reference to an incident involving Haneiph and work boots appears in a July 26, 2017 internal correspondence in connection with the Facebook post (GC Ex. 15), which is over a month after even the latest date the Company (inaccurately) claims the situation with the work boots arose. The Company was not able to produce any evidence that it had previously fired anyone for showing up to a job without work boots or even more generally, for failing to arrive with all the

required personal protective equipment. Tr. 1067; R Exs. 14-23, 25-27, 32-37, 39-42. And at the hearing, Trade Off actually contradicted its own prior testimony where Hagedorn in an affidavit had placed the work boots incident on June 20, 2017 (GC Ex. 13, Ex I, Par. 5), claiming for the first time at the hearing that the incident occurred on June 21. Tr. 867. There is absolutely no record-evidence backing up that claim, just as there had been no record-evidence backing up the earlier claim that the incident occurred on June 20. Rather, the Company's change in its account of when the incident occurred was nothing more than an attempt to cover up an earlier lie with a new one. The work boots incident clearly had not occurred on June 20 or June 21, but before, which entirely contradicts the Company's story that Haneiph was not put to work afterwards.

Haneiph was fired because of his concerted activity in posting an endorsement of Local 79 on Facebook.

3. Robinson and Thomas Cases.

David Robinson and Darrell Thomas are former Trade Off Plus workers who on September 15, 2017 distributed leaflets outside a Trade Off jobsite and on October 4, 2017 solicited coworkers' signatures outside a different jobsite in protest over a Company decision to change the payroll period and thereby only pay workers for three days of work that week. The Consolidated Complaint alleges at paragraphs 15-17 that supervisor Rich Cotrite illegally threatened Robinson and Thomas with discharge on September 15, that foreman Delbert Hall illegally interrogated Trade Off workers during the concerted activity on October 4, and finally, that the Company illegally fired Robinson and Thomas because of such concerted activity.

The Company basically did not defend the claim involving Cotrite's threat. The threat was captured on a video admitted into evidence as GC Exhibit 2, and both Robinson and Thomas

confirmed it in their testimony. Tr. 62 (Robinson), 269 (Thomas). Nor did the Employer offer a defense to Hall's illegal interrogation which he admits to in a video introduced into evidence as GC Exhibit 26.

The Company likewise does not dispute that it fired Robinson and Thomas based on their activity on the morning of October 4. But it claims that the conduct at issue was not the protest *per se*, but, alternatively, the manner they conducted it, their work-performance that morning, or the way they responded to the direction to leave the site (i.e. their firings).

The Company did not present any witnesses to Robinson's and/or Thomas's alleged misconduct in seeking to have their petition signed, nor to their alleged failure to perform assigned work that morning. The General Counsel introduced the only evidence in the record about Robinson's and Thomas's conduct during that period. The General Counsel presented the testimony of the two workers and a video of their exchange with Hall before the start of the work day. GC Ex. 3. The General Counsel did not make out the Employer's defense for them. The video does not show the workers engaging in violent or threatening behavior and the workers did not testify to their own insubordination.

The Company's "evidence" of insubordination thus comes down to Hagedorn's testimony that he at one point asked the two workers "why they weren't performing their work assignments", and a few minutes later told them they would be forced to leave the site if they did not resume their "duties", all of which contradicts his affidavit where he describes no such questions or threats of termination, let alone a disobeyed order. Tr. 904; GC Ex 13, Ex E.

The Company took a video of the two workers' responses to being fired (GC Ex.26), but the tape did not substantiate the Employer's claims that Thomas acted in a threatening manner,

let alone that Thomas "lunged" at Hagedorn; and in any event, the video is a record *of the firings*, so it cannot likewise constitute a basis *for them.*

The Company illegally threatened Robinson and Thomas on September 15, interrogated them on October 4, and fired them that same day because of their protest activity.

4. Kerr and Zimmerman Cases.

Larry Kerr and Willie Zimmerman are two former Trade Off employees who the General Counsel alleges the Company discharged on January 9, 2018, shortly after they registered for the Local 79 apprenticeship program, and in Kerr's case having previously attended meetings at Local 79's office. Consolidated Complaint par. 14.

The Employer claims that the discharges were not based on the two workers' contacts with the Union, but rather on Kerr's allegedly improper conduct in informing Zimmerman to come to a 95th Street job for work on January 6, 2018, and on Zimmerman's conduct, in turn, *of showing up and working*. The Employer denies knowing about the workers' contacts with the Union.

As explained in greater detail below, Hagedorn admitted to monitoring the Local 79 Facebook page which provided detailed information about the apprenticeship recruitment (Tr. 972-3, 1031), and both workers testified persuasively and consistently that they were surveilled by the Company while on line to submit their applications (Tr. 404-409, 467-473). The Company's reasons for discharging the workers were so fallacious and the method by which it discharged them so strikingly similar to how it discharged Thomas and Robinson, that it is clear Trade Off was responding to concerted activity, not breached "protocol". Further, it came out at the hearing that the Company had "infiltrated" one of the Local 79 meetings which Kerr had

attended. Tr. 763 (Kerr testifying to his attendance at Local 79 meetings); GC Ex. 44, par. 21 (Company alleging in a verified complaint that it used Trade Off Carpenter Clayton Lowrie to get information about what happened at such meetings). In short, the direct and circumstantial evidence presented at trial makes clear that the Company illegally fired Zimmerman and Kerr because of their contacts with Local 79.

5. Allegation Added by Amendment to the Complaint Regarding Bonilla.

Finally, the General Counsel amended the Consolidated Complaint during the course of the hearing to allege an act of interrogation and surveillance by Supervisor Jose Bonilla of a worker, Shawn Person, on July 25, 2017. The amendment was based on an email entered as GC Exhibit 21 describing the illegal conduct, which Bonilla admitted in his testimony occurred precisely as the e-mail describes. Tr. 540.

B. Hagedorn's Complete Unreliability as a Witness.

The Employer's entire defense to these cases—to the extent any was offered—is based on the testimony of general superintendent Hagedorn. While most of the cases are heavily supported by the Company's own records and/or its failure to call witnesses in a position to contradict the General Counsel's evidence, Hagedorn proved to be such a dishonest witness that it bears reviewing the myriad ways that played out.

He lied about things large and small, about things that mattered and things that didn't, and he conducted himself in such an evasive, aggrieved, and disingenuously ignorant manner that nothing he said on behalf of the Company can or should be relied upon to establish the facts of these cases.

For example, having testified in the depositions in another case that he suffered from various mental illnesses because of the anxiety Local 79's contact with his workforce supposedly provoked, he told the ALJ that he had never even heard Company management articulate opposition to Local 79 unionization. Tr. 1057. Note, it would have been completely legal for the Company to have taken the position that it strongly disfavored unionization and informed workers of its potential down sides. But that is not what Hagedorn said at trial—instead, he made claims so inconsistent with his prior testimony that he appeared to be lying gratuitously. He claimed he not only never tried to discourage workers from speaking to union representatives (Tr. 965), but said he *encouraged* them to attend meetings at Local 79 so that they could learn more about the opportunities the Union presented (Tr. 1014).

And all of this was articulated in the face of overwhelming documentary evidence that Hagedorn and other members of management were beside themselves over workers' contacts with the Union, and in particular with organizer Paris Simmons. Hagedorn admitted at the hearing that foremen were instructed to document all observed contact workers had with Simmons or Local 79. Tr. 1017-18. E-mails show the Company lawyer telling Hagedorn to illegally interrogate workers about their attitudes toward Local 79 because "that would be wonderful [...], and [would] be very helpful in assessing the risk of unionization." GC Ex. 34. Other internal correspondence shows consistent references to lawful union activity as "harassment" (GC Ex. 15), and assessments of which workers were "loyal" or "core" (GC Ex. 34), or which others were "easy pickings", might "flip" (GC Ex. 43) or had become "toxic" (R Ex. 28, Floyd at 8:17 a.m.).

And beyond that, Hagedorn routinely contradicted prior statements under oath without seeming to care. For example:

- He testified at trial that he was "being stalked by Paris Simmons", and that "[Paris] followed [him] down Broadway [in] Manhattan with a ski mask on" (Tr. 1004); but in his earlier deposition, referring to the same incident, he had testified, "I walked across the street ... [Paris] [stayed by the car] at that time" (Tr. 1064). *See also* R Ex. 8 par. 38-39 (identifying the incident with no indication Simmons moved from the car after Hagedorn tried photographing him).
- He insisted that Pimentel lied by claiming Trade Off provided no health benefits, but he admitted he had submitted an affidavit to the Region describing the companies benefits and testified with respect to Trade Off's supposed health, "Yeah. It doesn't state anywhere – anywhere in here that Trade Off has a health benefit plan…". Tr. 986. He was "not certain" any employee had even previously mentioned getting benefits from a Trade Off health plan. Tr. 994.
- He claimed he had not tried to discourage workers from speaking with Local 79, and specifically had not taken them out for donuts or coffee to discuss how to "handle" Local 79, but upon being confronted with contradicting prior testimony from his deposition, basically admitted he had. Tr. 967-969.
- As earlier noted, he claimed that he encouraged workers to go to meetings at Local 79 to learn more about the Union (Tr. 1014); but when shown GC Exhibit 35 (regarding an attempted to "infiltrate" Local 79 meetings), he acknowledged that the real reason he was "sending employees to Local 79 meetings" was to "maybe see what they [were] saying about Trade Off." Tr. 1020.
- He had submitted an affidavit to the Region stating that Riccie Haneiph was sent home on June 20 for reporting to work with sneakers (GC Ex. 13, Ex. I, par. 5), but then when

confronted with payroll records showing that Haneiph worked and was paid for that day, he testified that the sneaker incident must have been on June 21, 2017. Tr. 867.

- An affidavit Hagedorn submitted to the Region makes no mention of his having any interaction with Robinson or Thomas on the morning of October 4, 2018 prior to his "inform[ing them] that they were being let go" (GC Ex. 13, Ex. E, par. 14), but confronted with a lack of any competent evidence that members of management gave the workers any specific directions they disobeyed that morning, he testified at trial that he had generally inquired why they weren't working and told them they would be told to leave if they did not, generically, resume their duties. Tr. 904-06, 938.
- And for reasons that can only be reasonably understood as overtly racist, after Hagedorn had repeatedly been asked at earlier depositions to articulate the conduct Simmons or other Local 79 representatives engaged in that led to his multiple claimed mental illnesses, he never once managed to identify even a single threat attributed to Paris Simmons. But at trial, he claimed Simmons had threatened to rape his wife and niece. Tr. 1065-66. He even specifically acknowledged that "[He had] not testified to that before." Tr. 1066. That is obviously not the kind of accusation a person should make lightly about anyone, but for Hagedorn to do so about an African American man with respect to Hagedorn's (presumably white) female relatives—is simply beyond the pale of minimally acceptable conduct.

And this was the Employers main—really only—substantive witness.

C. All of the Other Witnesses Strongly Supported the General Counsel's Case

The General Counsel called all of the other witnesses, two of whom were Company supervisors, Jason Abadie and Jose Bonilla.

Abadie merely testified as the Company's designated custodian of records, although his testimony had some substantive value because it completely undermined the Employer's presentation of itself as a model of rule-based efficiency. Abadie seemed to have no idea what efforts the Employer made to comply with the subpoena and admitted that having gone through six different Human Resource managers its record system was all but nonexistent. Tr. 720.

Jose Bonilla, as mentioned, was called to authenticate the e-mail regarding his illegal surveillance and interrogation of Shawn Person. He did so, and also contradicted Hagedorn's disingenuous contentions that the Employer had no preference as to whether its employees sought unionization, testifying that he believed that "loyal" workers were ones who wanted to stay with the Company, rather than go work with the Union. Tr. 540.

All of the employee-witnesses testified with great integrity. In fact, there was a certain similarity to their dispositions in that all seemed to be embracing the opportunity to give account of their experiences with the Company, finally without fear of retaliation or risk of being deemed dangerous for doing so.

Riccie Haneiph testified with honesty and great candor. He acknowledged not remembering dates well (*e.g.* Tr. 150) and, in particular, had trouble remembering when a meeting at the Center for Employment Opportunities occurred, the timing of which was not relevant. He honestly admitted that he once made a mistake in his eagerness to get to a job and showed up without his work boots. He was never disciplined for that conduct, just not put to work that day. Tr. 168. There is simply no reason to discredit Haneiph's testimony about that. The Company has no records of any discipline being administered in relation to that incident, and Hagedorn's testimony on this point was, as explained before, utterly unreliable. And the fact that Haneiph was never disciplined for the sneaker incident is really the only proposition in his

testimony that matters. Everything else about his case is entirely undisputed. He posted a message on Facebook which set off a stream of apoplectic Company internal responses, and he never worked again.

David Robinson testified with consistency and great clarity to his protest activity and, in particular, his conduct and whereabouts on the morning of October 4. In retrospect, the Employer's counsel's feigned outrage over the "inconsistency" in his testimony—that in his affidavit he said Hagedorn told him he was fired for not going to the basement, while at trial he said Hagedorn told him just that he was fired "for insubordination"—is remarkable mainly for the contrast it provides to the astounding contradictions in Hagedorn's testimony. Tr. 118; *see also* R Ex. 26A (showing that Robinson got it right at the hearing: Hagedorn is heard saying he was fired "for insubordination"). That was the full extent to which the Employer could poke holes in Robinson's account: on the precise language used *to fire him*. Indeed, Robinson testified so clearly and honestly that his testimony provided the only suggestion that the Company ever asked anything of him that he did not directly and unambivalently do.

Robinson testified that after Al Calderon told him and Thomas first thing in the morning of October 4 to return to the 9th floor (where they had worked the previous day), Delbert Hall mentioned to him in the hoist that he should go to the basement, without saying what he was supposed to do there. Hall did not return to clarify or reiterate a direction. So Robinson went to work on the 9th floor as Calderon had directed, until Thomas told him they were wanted downstairs. Tr 87-88. As discussed in greater detail below, his response to the one comment from Hall was clearly not the reason for his discharge. Robinson's testimony should be fully credited.

Darrell Thomas likewise testified honestly and forthrightly although the confusion the Company had created over what it expected him to do on the morning of October 4 seems to have confused him regarding the number of times he went up and down the hoist that day, and at what times of the day that happened. He testified on direct examination that on the morning of October 4th he went up to work on the 9th floor as he had the three previous days and never heard Hall or anyone else tell him to do otherwise. He initially said he may have gone up and down the hoist that day as many as three times and did not think he was ordered off the site until after break. Tr. 296-98. Later, however, he made clear that he was not certain if and when his trips on the hoist occurred. Tr. 360 ("I don't recall, I really don't remember if I went back to the ninth or not" [after break]).

His affidavit to the Region included a statement to the effect that after break Hall, while on the ground floor, ordered one of them to go to the basement and immediately thereafter Hagedorn came up and fired them. As is clear from R Exhibit 26, that is not what happened because Hall is heard yelling that they were not on the 9th floor (no reference to the basement). And nothing about Thomas' affidavit suggests he at that point or otherwise failed to follow a directive. But counsel for Trade Off was able to momentarily make it seem as if in response to the basement reference by Hall, Thomas went up to the 9th floor. Tr. 362-64.

That is obviously not what happened, and Thomas was much clearer about it on re-direct, especially when it was brought to his attention that in the video (GC Ex. 26) Hall is saying to him that he had failed to go *to the 9th floor*. Tr. 377-78 (Thomas: "he saw us go off on the ninth floor so that was … kind of strange"). He then testified completely consistently with Robinson (and accurately) that upon coming down to the ground floor Hagedorn initially spoke to them about the petition *without Hall present* (Tr. 378) and that he didn't see Hall again until "when the

video is—when it shows in the video" (Tr. 379). While even on re-direct he mistakenly placed an (irrelevant) trip back to the 9th floor in between those two conversations with Hagedorn (Tr. 379), it was clear that the closest thing Hall ever said to him akin to a directive was when he accused him of not following orders as Hagedorn came up and fired them.

Numerous other pieces of evidence (including Hagedorn's own testimony) confirm this. No one testified that Hall was at the first conversation the workers had with Hagedorn, and Robinson and Hagedorn agree that the second conversation—in which Hall joined—occurred only moments later. Tr. 91 (Robinson); Tr. 904 (Hagedorn). That means Hall could not have provided an order in the first conversation (because he wasn't there) and, further, the workers couldn't have gone to the 9th floor in response to the first conversation, because there wasn't enough time. And the second conversation is the one in which they were fired.

Most importantly, Thomas was clear throughout that he never disobeyed an order[1]. And he greatly clarified his testimony towards its end—especially on questioning from the ALJ—that the only comments Hall made to him that morning regarding work assignments were as Hagedorn approached *to fire them.* Tr. 379-83, 388-89 (making clear, on questioning from the ALJ, that there was no "gap" between Hall mentioning the basement and Hagedorn coming up and firing them).

Further, the Company's own recording of the firing shows Thomas insisting "we were on the 9th floor", Hall saying something about the 10th floor, and then Hall saying "I know they didn't go to the 9th floor". GC Ex. 26A. In other words, to the extent the Company argues in its briefs that Hall told one of the workers to go to the basement and that they then got fired for

[1] He is a Marine veteran of the First Gulf War.

going to the 9th floor—that contradicts the words out of Hall's own mouth, as shown in the video. He clearly says "they" were supposed to be on the 9th floor—which is where they were.

Willie Zimmerman testified in a soft but deliberate manner, as to the very few events he witnessed relevant to his discharge. As is undisputed, he was told by his half-brother Larry Kerr, on January 6, that there appeared to be an opportunity to get back on the 95th Street job. He reported and was put to work. That is why the Company says it fired him. On January 8, he left work to submit his application to the Local 79 Apprenticeship Program and testified persuasively that a vehicle he recognized from the Trade Off site went back and forth along the line of applicants, traveling at a speed slower than regular traffic, with someone looking out the window while covering their face. Tr. 404-409.

Larry Kerr also testified absolutely credibly and consistently. He did not characterize his conversation with Site Safety Manager Michelle Depew as her giving him an "order" to call Zimmerman. Tr. 454-55 ("she told me to ask for him"). He always understood he needed to clear her request with Trade Off management and tried to do that but was either ignored or permitted to proceed. GC Ex. 17 (text to Hagedorn); Tr. 460 (Hagedorn strangely non-responsive); Tr. 461 (describing conversation with foreman Cesar who said to "ask Justin", and when Kerr said he had, told him "OK, pretty much"). All that Kerr had done was—after checking with two members of management—tell Zimmerman to show up to the job. The Company, knowing that he had done that, put Zimmerman to work. So too, Kerr's testimony about the surveillance on the line for the applications was credible and entirely corroborative of Zimmerman's. Tr. 467-73.

Last, Kerr testified—without any effort from the Company to rebut it—that he attended a meeting at the Union's office that fit the description of a meeting the Company described in one

of its verified complaints against the Union as having been successfully infiltrated. Tr. 763. Kerr's testimony should be credited in its entirety.

Site Safety Manager Michelle Depew came to the hearing with more to gain from siding with the Company than with the Union as she had worked as a subcontractor for Trade Off's client, Gilbane Construction on the 95th Street job. But she entirely corroborated Larry Kerr's account, not Hagedorn's. She testified consistently with Kerr about their conversation regarding the need for more workers on the site and the desirability of getting Zimmerman back. Tr. 513-14; *see also* Tr. 524 (ALJ: "Did I hear you right that you suggested to Kerr that he talk to the foreman that he get Zimmerman reinstated to the site; Depew: Yes). She testified that she had no recollection of Hagedorn ever asking her about her conversation with Kerr. Tr. 514. In other words, Hagedorn was yet again lying when he claimed to the Region, and then again at the hearing, that part of his "investigation" of Kerr and Zimmerman involved speaking to Depew.

Ricardo Pimentel's brief testimony provided a thoroughly persuasive and credible account of the difficulty he experienced obtaining safety harnesses for his crew during his stint as a Trade Off foreman and his inability to get signed up to a referenced health care plan.

Darrell Jamison similarly testified persuasively and directly to the multiple times he was either asked to work without a safety harness when one was required or witnessed other workers doing so, including authenticating pictures and video he took of some of these incidents. He also testified to being yelled at by a foreman when he requested a harness and shortly thereafter being threatened with a pay-cut. Tr. 659-61. He testified that he received no safety training from the Company, which it does not dispute. Tr. 617.

Other witnesses the General Counsel called, Robert Tiburzi and Timothy Warrington, testified regarding the content on the Local 79 Facebook page and were completely competent and believable witnesses. Tr. 750 (Tiburzi), 792 (Warrington).

In short, the witnesses the General Counsel called all provided strong support and warrant for the charges asserted against Trade Off in the Consolidated Complaint. The Company's sole witness called as part of its case was Hagedorn, and his testimony was epically unreliable.

ARGUMENT

A. Trade Off Violated the Act by Suing Pimentel and Jamison.

Under *Bill Johnson's Restaurant* and its progeny an employer violates 8(a)(1) of the Act when it commences a legal action against employees that is baseless and retaliatory in motivation. The Defamation Complaint is both.

Under *Linn v. United Plant Guard Workers*, 383 U.S. 53, 58, (1966), state law claims for defamation arising out of labor disputes—such as those at issue here—are preempted by federal law (and thus subject to dismissal) unless the plaintiff can establish that the allegedly defamatory statements were made with malice, which is to say—with a gross indifference to the truth. Further, the plaintiff must prove special damages, meaning that a generic injury to reputation is not adequate to establish a claim.

At the hearing, Trade Off did not even endeavor to establish that Pimentel or Jamison spoke with malice about their experience at Trade Off. The Company offered no witness who even claimed to have conducted an investigation that might have formed the basis for the Employer's lawsuit. The one witness it presented, Hagedorn, testified that he did not know the basis for the claims. Tr. 1037 (Q: "So you don't have any personal knowledge about the basis for

that case," A: "I—no.") And the testimony of the two employees certainly did not demonstrate any basis for the suit. Both testified credibly to the grounds for their statements.

1. Pimentel's Testimony and Circumstances

> Pimentel was sued for stating in a short video posted on the Union's Facebook page that "you might only have one harness in a shanty and with a whole bunch of guys that you gotta share. And you're lucky to get that because you gotta fight for that, you gotta argue for that, you gotta push for that because you do a lot of dangerous things just being a laborer",

and that "there [were] no benefits". At the hearing Pimentel testified that harnesses were not readily available at the job site, and that that a request for harnesses was once expressly turned down by a Trade Off supervisor so he had to go to Trade Off's client, Bravo Builders, which gave him two. Tr. 617-19. As such, he clearly spoke in good faith in stating that when he worked for Trade Off it was difficult to obtain harnesses, such that if there was one available, you had to be in a position to fight for it.

He also stated in the video that he had not been provided benefits and explained how he had requested to enroll in the Company's medical plan but was told it was not worthwhile, and despite his still further insistence on being enrolled was unable to get signed up. Tr. 613-15.

The Company's "defense" of the Pimentel case consisted merely in arguing that they complied with applicable safety regulation and had a health care plan for Trade Off employees. Mr. Pimentel had not stated, however, that the Company had been found to have violated the law by not maintaining adequate fall protection; he had just said he had struggled to obtain the needed equipment for himself and his crew. As such, the Company's response was simply inapposite. It did not offer any witnesses to contradict Pimentel's specific account of struggling to obtain harnesses.

Likewise, the Company claimed it provided "benefits", noting that it had a health care plan for Trade Off employees and provided sick days (as required by law). The Company, however, never produced a summary plan description describing the medical benefits allegedly offered, failed to show any documentation indicating that Pimentel had been covered by a Company plan, and when Hagedorn was confronted on cross examination with a prior statement under oath where he had described a bronze level medical plan available for Trade Off Plus employees with no reference to health benefits for Trade Off employees, he "explained" that Trade Off probably did not provide a bronze level benefit. *Supra* at 10.

But a bronze level plan is the lowest form of qualifying coverage available under the Affordable Care Act and Hagedorn acknowledged that whatever plan Trade Off had, it would have been worse than the one maintained by Trade Off Plus. Tr. 995. In other words, Hagedorn admitted that within the meaning of federal law, the Company was not in fact providing Trade Off workers medical benefits (because bronze is the lowest level of qualifying plan). Furthermore, Hagedorn had no specific recollection of his interactions with Pimentel and so was not in a position to dispute Pimentel's account of trying, but failing, to get signed up for the alleged plan. Tr. 992 ("I'm not certain of that day and that time").

Likewise, the notion that the Company's supposed compliance with New York law in offering sick days constituted the provision of "benefits" is laughable. Offering the minimal legally required paid sick leave is not what the ordinary person would consider a "fringe benefit".

So the Company, again, failed to hit even the false target it set for itself—of showing that it offered benefits to Trade Off employees. In fact, its burden was to show Pimentel spoke in bad faith when he said he had not received any, and the Company did not even try to establish that.

2. Jamison's Testimony and Circumstances

Darrell Jamison was quoted in a Labor Press article as having stated at a rally that he had not received any safety training from Trade Off and that after complaining about not being given adequate fall protection he was cursed at and threatened with a loss of pay. He clarified in his testimony that he had not quite stated it that way in his brief speech, because the threat of the loss of pay occurred about a week later. Tr. 660-661. The Company did not claim at trial that it provides any kind of safety training, let alone that Jamison received any. Hagedorn, again, merely testified generically that the Company did provide safety harnesses. And while that is, again, inadequate to defend a *Bill Johnson's* charge—it is not even true. Jamison had pictures and video of Trade Off laborers performing work under circumstances that required a harness, without being secured in any way. GC Exs. 19, 23; Tr. 654-659. The Company further did not call the foreman who had cursed at Jamison (and failed to provide him a harness), and likewise did not deny that it shortly thereafter told Jamison it was going to cut his pay.

In other words, the Company failed to cast a scintilla of doubt on the veracity of Jamison's public statement, let alone show that it was made in bad faith.

3. Other Issues

Last, the Company made absolutely no effort to show a basis for collecting special damages through the state court lawsuit. That by itself is enough to find the lawsuit baseless. And the Company likewise made no effort to dispute—because there is no way to dispute—that the state lawsuit seeks to hold Jamison and Pimentel liable in civil damages for their protected activity. That is what the lawsuit *says*.

Local 79 respectfully requests that the ALJ find the Employer violated the Act by suing Jamison and Pimentel for defamation.

B. Trade Off Violated the At by Discharging and/or Failing to Re-Hire Riccie Haneiph.

As set forth in paragraph 12 of the Complaint, Trade Off also violated the Act by failing to provide work opportunities to Riccie Haneiph beginning in or about mid-July 2017. The Complaint was also amended during the hearing to alternatively allege the Employer illegally terminated Haneiph in or about that time.

There is no dispute that Haneiph engaged in concerted activity on July 18, 2017 when he posted messages connected to Local 79's Facebook page, stating "I'm a Trade Off worker and I want to be a part of this movement as well because we are being treated unfair" (at 4:18 p.m.), and "I'm a Trade-Off worker as well and WE ARE BEING TREATED UNFAIR! I encourage all Trade off workers to join us and be a part of this movement!" (7:25 p.m.). GC Exs. 10 and 16.

He did not get work again, meaning the General Counsel has easily established a prima facie case of discrimination under *Wright Line*, 251 NLRB 1083, affirmed 662 F.2d 899 (1st Cir. 1991).

The Employer's proffer of a non-discriminatory basis for firing Haneiph consists of its claim that he was fired for reporting to work without his work boots. There is no doubt this claimed reason is pretextual.

Haneiph, in his testimony, acknowledged that he once received a call while in the subway and rushed to the job not realizing his work boots were not in his backpack, but that the only "discipline" he received was that he was not put to work on that job that day. He suffered no

other interruption of his employment as a result of that incident and was shortly thereafter referred to another job by the Company. Unlike Hagedorn, who was the only witness to testify for the Company on this point, Haneiph was entirely credible. He did not recall what day the workboots issue happened but knew it did not result in his termination. Tr. 168. That is all that mattered. For that reason alone, the Company's proffered non-discriminatory reason should be rejected. That is—based on Haneiph's testimony it was established that he was not fired because he reported without work boots.

But beyond Haneiph's testimony, there are multiple corroborating facts and documents supporting Haneiph's account. These include that although the Employer submitted numerous written notices of termination regarding various employees, it could provide no writing whatsoever evidencing that it ever fired Haneiph, let alone that it did so because of the work boots incident.

To the contrary, the Company provided Haneiph a letter dated July 19, 2018 (the day after the Facebook post, but presumably before they had noticed it) *confirming that he was still employed.* GC Ex. 9.

The Company's response to Haneiph's claim for unemployment further contradicts its account of firing him for the lack of work boots. The Company completed the New York State Department of Labor's form articulating its protest of Hanieph's filing for unemployment compensation by checking the box "Voluntarily Quit" (GC Ex. 38). It noted his last day of work as July 26, 2018, which is the date Hagedorn advised Abadie and other members of management that he had found the Facebook post. GC Ex 16. The unemployment compensation protest further directs the reader to "see attached e mail", which was GC Ex. 37, a letter from Ayanna Williams to the department, which noted "[a]lso during work hours Mr. Hanieph was seen

protesting with Local 79 see photo attached July 13th". And, in turn, that reference was clearly to the July 13 picture on Local 79's Facebook page of protesting Trade Off workers in response to which Haneiph posted on July 18. GC Exs. 10 and 16.

Not only is the unemployment response a lie because Haneiph was not in the picture and obviously had not protested during work hours on July 13, the Company's response expressly connects the reasons for Haneiph's discharge to the protest and Facebook post. It actually does so by treating Haneiph's association with the protest *as the equivalent of him quitting.* The "evidence" the Company proffered for the claim that Haneiph quit was the print-out of the Facebook page. In the Company's distorted (and illegal) logic, Haneiph' post was the equivalent to abandoning his job.

This point is crucial because it is consistent with and corroborative of the overwhelming evidence in the multiple cases that the Company viewed any showing of support for Local 79 as tantamount to an abandonment of Trade Off (in Haneiph's case, *literally so)* Bonilla testified similarly when he admitted that he believed it was necessary for him to interrogate employees about their contact with Local 79 because such contact was disloyal, and the Company had a right to expect loyalty. Tr. 537-539. Hagedorn's internal correspondence with other members of management is rife with characterizations of Local 79-associated employees as "toxic" (R Ex. 28), having taken the "bait" (GC Ex. 43), and having been "grabbed" by the Union (GC Ex. 43). He referred to a "fringe guy" as someone who was "interested in going with Local 79" ... and said that "if they wanted to go with Local 79, they wouldn't be an employee of Trade Off." Tr. 1019-20. The Company actually considered Local 79 a competing company. GC Ex. 44 par. 28 (referring to Local 79 members as "employees" or "independent contractors" of the Union). In

short, Trade Off workers who "joined up" with Local 79 were treated as having defected from the Company to a competitor.

And so not surprisingly—despite the reams of documents the Company put in the record showing the various reasons it had terminated employees in the past—it produced no documents showing it had ever terminated anyone for showing up to a jobsite without work boots, or for that matter any other kind of required personal protective equipment (*e.g.* a helmet). R Exs. 14-23, 25-27, 32-37, 39-42. While Hagedorn offered the incredulous explanation that such a thing had never transpired in the Company's history (before Haneiph did it), that defies common sense. Tr. 1067. The testimony of Site Safety Manager Michelle Depew demonstrated that numerous workers were actually walking around the 95th Street job with sneakers and were not even sent off the job (let alone fired) until she got there. Tr. 507, 526. Haneiph, Pimentel, and Jamison testified to shocking incidence of Employer disregard for worker safety, in Jamison's case accompanied by pictures and video of employees working at heights without harnesses. And in any event, it is just absurd to suggest that among the hundreds of laborers Trade Off employed over the years—many of whom were formerly incarcerated people entering the workforce for the first time—no one ever came to work without all his or her required gear.

So too, crediting Trade Off's account of its firing of Haneiph requires believing the Company's re-revised story that the event specifically happened on June 21, 2017 (recall, the unemployment compensation response initially put the last day of employment as July 26, 2017, GC Exs. 37-38). If his termination happened any earlier than June 20, Haneiph's confirmed work for the Company on that day would contradict the story that he never worked after the work boots incident. GC Exs. 39-40 (showing Haneiph worked for the Company at Fulton Street on June 20). Hagedorn had already submitted an affidavit to the Region swearing that Haneiph's

work boots issue occurred on June 20, 2018. GC Ex. 13, Ex I, par 5 But rather than finally acknowledge the obvious—that the incident occurred before June 20 and did not result in a discharge—the Company made-up yet another story on the second to last day of trial, to the effect that the sneaker episode happened on June 21. There is simply no documentary or other corroborating evidence supporting this contention. It is just another example of the Company—and in particular, Hagedorn—yet again lying to account for the relentless flow of reliable evidence contradicting their fabricated stories.

And last, the fact that Hagedorn so widely circulated news of Haneiph's post—to his managerial team and twice to the non-profit that had initially referred Haneiph—while never before having noted any sneaker/work boots issue—makes it still more clear (if that is even possible) that it was the post, not the sneakers, that bothered him. Hagedorn blithely claimed at the hearing that the reason for his reporting to the non-profit was because he liked to keep them "informed" "when anything would happen with a worker who came from the CEO program." Tr. 1027. But according to his trial version of the story, by the time he complains to CEO about Haneiph on July 26, 2017—Haneiph had been out of the Company for over a month. And he had never bothered to tell them *that*. Haneiph is not even referred to in the July emails to CEO as a former employee, and CEO is not even informed in those threads that Haneiph is going to be (or was) fired for the work boots, Facebook, or any other issues. In other words, the e-mails to CEO confirm what the report to the New York Department of Labor expressly states, that Haneiph was never fired, he was treated as having voluntarily quit once his Facebook post was found.

Trade Off's proffered non-discriminatory reason for discharging Haneiph was pretextual and the Company accordingly violated the Act by discharging and/or failing to re-hire him

because he made the post. Moreover, the extent to which it, and in particular Hagedorn, lied about this at trial is an important fact about his (and the Company's) complete lack of credibility *in all of these cases.*

C. Trade Off Violated the Act by Threatening, Interrogating, and Firing Darrell Thomas and David Robinson.

The General Counsel alleges that David Robinson and Darrell Thomas were unlawfully threatened with discharge on September 15, and illegally interrogated and discharged on October 4, 2017.

1. Cotrite's September 15, 2018 Threat.

Robinson and Thomas both testified that on September 15, 2017, while protesting outside a Trade Off Plus jobsite before work hours, Company supervisor Rich Cotrite approached and advised them that that "you know, you can get fired for this." The exchange was captured on video by Local 79 organizer Paris Simmons, and the recording was admitted into evidence as GC Exhibit 2. The recording evidences the threat as testified to by the two employees.

The Company did not call Cotrite or otherwise offer a defense to this charge. Tr. 61-62.

2. Hall's Unlawful Interrogation of Trade Off Plus Employees.

On October 4, 2017, Robinson and Thomas attempted to get fellow workers to sign a petition before work protesting a change in the pay schedule which was going to mean employees got less than a full check for the week. A loud conversation then occurred between Hall, Robinson, and Thomas which was filmed by Simmons. On the recording, you can hear Hall acknowledging in front of the employees that he had asked them when he first approached "do you want to be a part of it", and said that he could ask them anything he wanted.

Hall is an admitted supervisor. Although Hall's statements were made "out of court", they are not excluded hearsay because they are admissions by a Company representative. And the comments clearly constitute an acknowledgement of seconds-prior unlawful interrogation of the employees.

The Company made no effort to dispute that the interrogation occurred as the video shows.

3. The Discharges

There were some differences in the testimony provided by Robinson and Thomas regarding what happened when they got onto the jobsite, and their accounts certainly differ from what Hagedorn testified to. Robinson provided the most consistent and credible account.

Robinson's Testimony About the Discharge.

David Robinson testified that Al Calderon directed him and Thomas, first thing in the morning, to work on the 9th Floor, and that the two proceeded to do that, stopping first on the 4th floor to get their brooms and shovels. Hall followed them onto the 4th floor, and then into the hoist, which they re-entered to get to the 9th floor. As Robinson was exiting the hoist, Hall tapped him on the shoulder and told him to go to the basement. He asked why, to which Hall did not respond. Hall stayed in the hoist, making no further comments, and appeared to proceed to a different floor. Robinson stayed on the 9th floor because he had been told by Al to work there, because it is where he had incomplete work from the past few days left to do, and because it was unusual for him and Thomas to split up. Tr. 85-88.

In other words, Robinson clearly suspected Hall was directing him to go somewhere he wasn't supposed to be, perhaps because he was upset over the morning protest. Robinson made

a sound decision and worked on the 9th floor until Thomas received a call and told him that Justin was in the building, so they went to speak to him. Tr. 89.

Robinson testified that when they got to the ground floor they saw Hagedorn and briefly tried to engage him over their concerns about the change in the pay-week and the petition. He "walked off" and they briefly followed him before abandoning the effort. They proceeded to the hoist (Tr. 90-91), and "five to seven" minutes later, Hagedorn came over and directed them to get their belongings and leave the site because they were being fired for insubordination. Tr. 91. The Company took a video of what happened next which basically shows the two workers being treated as if they posed security threats, which they clearly did not. Thomas expresses disgust at the situation, and the two sign out and leave. R Ex. 26.

Plainly, on these facts, the discharges were retaliatory. Contrary to the termination letters Robinson and Thomas subsequently received, neither had at any point engaged in violent or threatening conduct; and Hall's one comment, without explanation, for Robinson to go to the basement, did not provide a ground for firing him, let alone Thomas. As noted, Al Calderon had told Robinson and Thomas to work on the 9th floor (where they had work to complete from the previous days) and Hall had refused to provide an explanation for the change in assignment or odd decision to split the two. The numerous notices of discharge for insubordination submitted by the Company show nothing remotely comparable to a situation like this, where a worker asks for an explanation regarding a cryptic assignment that conflicts with one just given, is ignored, and then fired for "disobeying" the one comment. And they certainly provide nothing comparable to Thomas' situation—to whom no directive was even given.

Furthermore, the comment to Robinson was so non-specific (and probably designed to make him go somewhere he wasn't supposed to be) that Hall seems not to have even

remembered it. He is heard in R Exhibit 26A yelling at Robinson and Thomas that they had not gone to the 9th floor as he directed. But the 9th floor is indisputably exactly where they had been working.

Hagedorn's Testimony, R-28, and Thomas' Testimony

As previously noted, Justin Hagedorn's cavalier lying on things large and small makes him a profoundly unreliable witness on any matter of import. However, there is one aspect of his testimony which accords with the time-stamps appearing in R Exhibit 28 and which likewise corroborates Robinson's testimony.

As just noted, Robinson described two encounters with Hagedorn, one after Thomas received the call telling them to come down from the 9th floor, and then a few minutes later another when Hagedorn met them over at the hoist and fired them. Hagedorn likewise describes two encounters occurring a "few minutes" apart, in those same two locations in between which he only had time to go near the bathroom to hear Hall's account and tell Hall he would be calling the office to remove the two from the site if they did not follow orders (i.e. he had already decided to fire them). Tr. 904. Among other things, Hagedorn provided absolutely no reason to believe that after his first exchange with Robinson and Thomas the workers had time to go back up to the 9th floor and then come down again. He, again, describes the two exchanges as separated by "a few minutes". Tr. 904.

R Exhibit 28 has evidentiary value to this point as well, even if it is hearsay (and at times double hearsay) insofar as the messages assert propositions about alleged misconduct. Hagedorn wrote an e-mail at 8:25 a.m. which reports to other members of management that he had conversed with Robinson and Thomas while they walked behind him asking about the petition.

That suggests that the initial conversation Robinson, Hagedorn, and Thomas all described occurred at or about 8:25 a.m.

Hagedorn's 8:55 a.m. email reports back to members of management that he had by then spoken to the Company's lawyer, Alan Model, and that Thomas and Robinson were off the site. Notably, in that message the "direct order" Hagedorn claims the workers violated *was his to leave the site*, which is consistent with R Exhibit 28 where Hagedorn is heard repeatedly directing them to depart. That is clearly the only directive he gave them and their response is shown in R Exhibit 28: they left (not that it matters, because they had already been fired so the pace of their leaving could not also have been the cause for their discharges).

R Exhibit 28 also thus indicates that 8:55 a.m. would have been the very latest that the two employees could have left the site, which again means they had not had time to—and did not—return to the 9th floor after initially coming down to see Hagedorn.

Darrell Thomas testified that they initially went to the 9th Floor because that is where he and Robinson worked the day before and because that is where Hall sent them on the morning of October 4. Tr. 295. He believed he initially spoke to Al (he is not sure where) who was only interested in the protest. He recalls coming down from break and then going back upstairs in between the two conversations with Hagedorn. Tr. 296-98. Clearly he was confused about timing and the number of trips up and down the hoist he took. Break was at 9 a.m.; R Exhibit 28 shows they were off the site by then.

The ALJ appeared to notice that Thomas had become confused about the timing of his exchange with Hall (the only issue on which his struggle with the number of trips mattered) and in his final questioning asked that Thomas for a moment disregard what he stated in the affidavit

and just testify to the best of his recollection as to whether there had been any "gap" between when he heard Hall speak about going to the basement and when Hagedorn came up and fired him. Thomas was clear and adamant—again—that there had been no time-gap, that Hagedorn immediately upon hearing the exchange with Hall fired him, and that at no point that morning had he ever been given a directive from Hall which he disobeyed. Tr. 377-88. Note, even the affidavit—which was to a substantial extent the source of Thomas's confusion in so far as it referenced too many times up and down the hoist and mistook the timing of the Hagedorn conversations as happening after break—does not indicate there had been any "gap". Tr. 387 (ALJ reading from affidavit). And that is all that matters, because if Hagedorn fired Thomas right as Hall made comments to him about where he was supposed to have been, then he clearly could not just then have been disobeying any "instructions." As the video (R Ex. 26) shows, he was instructed at that point to leave the building, and he did.

The Company's Asserted Grounds for Filing Robinson and Thomas are Pretextual

There is no doubt that the General Counsel made out a prima facie case under *Wright Line,* nor is there any doubt that the Company's claim of a non-pretextual grounds for the firings based on supposedly threatening behavior is fallacious. All of the alleged incidents of threatening conduct are captured on videos which show nothing of the sort. Indeed, the second video captures events *after* the two employees' terminations had been effectuated.

And with respect to the claim of insubordination, the Company itself introduced no evidence that it ever ordered the two employees *to do anything.* The closest thing to such an account comes from Hagedorn who testified that during the first exchange he "asked them why they were not completing, you know, work assignments" (Tr. 904), and likewise that prior to removing them from the site a "few minutes" later he told them "if they were not going to

complete work activities, you know, job duties, that they would be asked to please leave the site" (Tr. 905). And while neither of those exchanges—even as described by Hagedorn—contained a directive which the workers disobeyed, Hagedorn's earlier affidavit to the Region contains no references to any interactions at all between him and the workers prior to him sending them off the site. GC Ex. 13 Ex. E. Just like Hagedorn's after-the-fact lie in the Haneiph case (where he shamelessly told a new story to rehabilitate a defense that had collapsed in light of the documentary record), Hagedorn changed his account regarding his comments to Robinson and Thomas from what his affidavit said to fill a huge hole arising from the fact that the Company had failed to provide any evidence at the hearing of any directive given to the two workers, let alone one that was disobeyed, and Hagedorn was their last (and really, only) witness.

As previously explained, Hagedorn is an entirely discredited witness on any material point about which he had any reason to revise his account to benefit the Company. He did so routinely and shamelessly.

Further, the Company representative's various (mostly hearsay) statements in the documents, videos, and at the hearing indicate no fewer than *four different contradicting orders.* Hall is heard in the video suggesting he told the two workers to go to the 9th floor and that they went to the 10th. The Company suggested at the hearing that the order involved going to the basement. Hagedorn in his 8:55 a.m. e-mail to management in R Exhibit 28 says they disobeyed his order to leave the site. And as just noted, Hagedorn in his hearing testimony suggested he asked or warned them on the ground floor that they needed to generically resume their duties.

By itself, this mass of conflicting statements ought to relieve the employees of any possible responsibility for not "following orders". The only clear account they heard from anyone was Al Calderon's, first thing in the morning, to go to the 9th floor; which makes sense

because that was where they had been working and had work remaining to do—and that is what they did.

Nonetheless, the Company will almost certainly principally rely on the workers' own testimony to argue that they violated Company directives. But the employees did not even remotely save the Employer from itself. Again, Robinson's account is the one that was throughout unwaveringly clear and consistent, on direct examination, on cross examination, as compared to his prior affidavit, as compared to the timeline of R-28, and even as compared to Hagedorn's own testimony concerning the timing and place of the encounters on the ground floor. And all Robinson said happened was they were initially directed to the 9th floor, after which Hall followed them to the 4th where they picked up their tools. On exiting the hoist on the 9th floor, Robinson (but not Thomas) received an oblique directive from Hall to go to the basement. When Robinson asked for clarification, Hall ignored him. And it turned out, Robinson was right to ignore him, because upon going downstairs Hall would scream that they were supposed to have been on the 9th floor, just like Al Calderon had initially told them—and fortunately for them where they had been since the workday began.

Thomas' momentary befuddlement about whether he ever went back to the 9th Floor in response to some basement-related comments from Hall is ultimately entirely irrelevant. He fully and persuasively clarified the testimony, especially during final questioning by Union counsel and the ALJ. He openly admitted to lacking firm recall as to the timing of the events and how many times, if any, he returned to the 9th floor. So for the Employer to try to manufacture a disobeyed order out of the fact that Thomas did not correctly recall the number of times he went to the 9th Floor cannot possibly constitute a viable defense. Thomas's confusion was well-placed: the video shows Hall wanted him on the 9th floor and it is undisputed that is where he

went. If he or Robinson had gone to the basement, Hagedorn would no doubt have fired them *for that.*

In short, the Company was clearly not so fortunate on the morning of October 4 as to have had two workers with impeccable prior-service records engage in a lawful protest—only to then within in less than two hours of starting work commit dischargeable offenses. Rather, within those two hours, the Company did everything in its power to confuse, trick, and attempt to provoke the two into misconduct. The e-mail thread in R Exhibit 28 shows the utter consternation of management over the morning protest and palpable eagerness to rid itself of "these men [who] are now toxic." R Ex. 28. That is why Robinson and Thomas got fired: because they protested; not because they engaged in any misconduct once the work day began.

The claim of insubordination was pretextual. Trade Off Plus fired Robinson and Thomas in retaliation for their concerted activity.

D. Trade Off Violated the Act by Firing Kerr and Zimmerman

Trade Off likewise violated the Act when it fired Larry Kerr and Willie Zimmerman for their concerted activity in seeking to enroll in the Local 79 Apprenticeship Program.

The General Counsel clearly established a prima facie case that both employees had engaged in protected conduct through their efforts to enroll in Local 79's Apprenticeship Program, and in Kerr's case attending meetings at the Union. Likewise, it is undisputed that the Company terminated both of them the day after they applied.

Trade Off claims it had no knowledge of any of the concerted activity and likewise claims a non-discriminatory ground for the firings. Neither of these defenses hold up.

The Testimony About What Happened at the Line to Drop Off Applications

As explained above, Zimmerman and Kerr's testimony about the vehicle surveilling the line of apprentices is sufficient to establish that the Company saw them engaging in the concerted activity alleged in the Complaint. Jose Bonilla denied that he was in the vehicle and both Bonilla and Hagedorn denied that Trade Off used a forest green Hyundai as described by the workers. Tr. 590, 859. But both Kerr and Zimmerman had seen the green Hyundai at their job site and had seen Trade Off personnel using it. Tr. 405-406, 467, 469, 471. They then saw *the same vehicle* surveilling the line of apprentices with individuals inside covering their faces peering out the window onto the line. Tr. 404-409, 467-473. That constitutes direct evidence of the surveillance. Simply on the strength and consistency of the two witnesses' testimony and the chronic dishonesty of the Company in general, and Hagedorn in particular, the General Counsel established that the Employer was aware of the two workers' activity, which as explained above—in the logic of Trade Off—would have been viewed as an effective abandonment of their jobs.

1. Grounds for Inferences Based on the Falsity of Proffered Company Explanations

The ALJ also has plentiful grounds to impute knowledge to the Company given the falsity of Hagedorn's asserted non-discriminatory grounds for the firings and highly suspicious behavior in firing the two workers. It is well established that a "Respondent's false reasons for [effectuating a] discharge is a strong factor in inferring Respondent's knowledge of [the discriminatees' union activity." *Aliante Casino & Hotel & Local Joint Exec. Bd. of Las Vegas*, 2016 NLRB LEXIS 628, *78 (2016) (citations omitted). (calling the pretextual nature of the employer's purported rationale an "equally powerful inferential factor" from which to conclude

an employer had knowledge of an employee's union activity"). Here, neither worker did anything wrong.

Zimmerman literally stands accused of responding to a call from his half-brother that work might be available and coming to the jobsite where he was in fact put to work for two days. Contrary to the Company's claim that he violated "policy and procedures", it failed to remotely establish a custom or practice, let alone a rule or order, against him or other employees learning about work opportunities from fellow workers and showing up to work. To the contrary, Hagedorn testified that the Company often hired workers it had never met before simply because they showed up to job sites and asked to be put on. Tr. 977-978. It strains credulity to believe that while a random person could find employment with Trade Off this way, a veteran employee like Zimmerman could be fired for it.

Further, if knowledge can be inferred from the falsity of the grounds for firing Zimmerman, then the Company had knowledge of *both* workers' activity, because it had no way of knowing about Zimmerman having been on the line to submit his apprenticeship application without knowing about Kerr. Kerr was standing right next to Zimmerman in line.

This is not to say the asserted grounds for firing Kerr were any less false. Trade Off claims that Kerr was fired for calling Zimmerman to tell him it appeared his services might be needed at the job. Tr. 887. Again, while the letter of termination says Kerr (like Zimmerman) failed to follow "policy and procedure" and "orders from supervisors" (GC Ex. 18) there is no evidence of that. Rather, he and Depew testified consistently about their conversation concerning Zimmerman coming to work. Kerr gave an account of the conversation that ascribed a bit more initiative to Depew, but the import of both of their testimonies was the same: Depew thought Zimmerman should be on the job (Tr. 513-514), and both acknowledged permission

from the Company was required. Kerr sought that permission. He texted Hagedorn and told his foreman, Cesar, exactly what was going on, including that he had told Zimmerman to come to the job site. GC Ex. 17. So the Company knew Kerr had contacted Zimmerman to come to the job, the foreman Cesar knew that Hagedorn knew, and the Company proceeded to put Zimmerman to work when he got there. Tr. 438, 460-464. Here is how Hagedorn described his engagement with Kerr on Saturday January 6:

> Q: You testified earlier that foreman Cesar called you regarding Larry Kerr and Willie Zimmerman, correct?
>
> A: Correct.
>
> Q: After Cesar called you, did you contact Willie or Larry regarding what was going on January 6th?
>
> A: No, I did not.
>
> Q: Jason Abadie told you to give Larry a final warning, correct?
>
> A: Correct.
>
> Q: And … So when you learned that Willy was coming back to the jobsite on January 6th, you did nothing to rectify that, correct?
>
> A: I sent an e mail to my project team … I spoke to Cesar and then I spoke to Jason Abadie. Then I sent out an email that I would handle it on Monday.
>
> Q: And you did not direct Zimmerman not to come to work on the 8th, correct?
>
> ***
>
> A: The next time I spoke with them [Zimmeran and Kerr] or the only time I spoke with them was on the 9th, when I handed them their termination letters.

Tr. 934-35.

So, at a minimum, the Company's complaint against Kerr—that he disobeyed supervisors—is manifestly false. For this reason alone, the Company's knowledge of his pursuit of the apprenticeship opportunity should be imputed.

Because claiming the two workers disobeyed orders makes no sense, what Trade Off seemed to suggest at trial instead is that Kerr somehow improperly acted as if he was privileged

to follow Depew's orders when he knew, or should have known, that Depew could not give him that kind of direction. But this merely creates a lie about what Kerr did in order to provide a (false) basis for firing him. Kerr clearly never told anyone he was following Depew's orders. His text to Hagedorn did not claim a privilege to add Zimmerman to the site based on Depew's directive, or otherwise. In fact, the whole reason he contacted Hagedorn was because he knew Depew's comments to him regarding Zimmerman *were not orders.* But Hagedorn never got back to him, not then, and not during his claimed "investigation" of the situation. The next time they talked was after Hagedorn had prepared termination letters, vetted by lawyers, with which to fire them.

So while the evidence and argument the Company will no doubt present in its brief will likely attempt to "show" that Site Safety Managers can't put laborers on payroll, that *will be evidence against them.* It will show them trying to ascribe conduct to Kerr that he clearly never engaged in. He, in fact, neither claimed to have acted on Depew's authority nor did he put Zimmerman to work, let alone on that authority. He reached out to two members of management to tell them about a Site Safety Manager's suggestion, and when they appeared to assent, he advised Zimmerman to come to the job site—*at which point the Company put him to work.* The next thing he heard from the Company was that he was being discharged.

2. Other Circumstantial Evidence of Company's Knowledge

There is other strong circumstantial evidence indicating the Company knew the two workers had union involvement based on the fact that it treated them in much the same way as it had treated discriminatees in some of the other cases. As in the case of Haneiph, the Company's claimed bases for discharging Kerr and Zimmerman were utterly incongruous with any discipline previously issued. The Company offered no evidence of anyone before Haneiph getting fired for

failing to bring requisite personal protective equipment to the job. Likewise, Hagedorn had no recollection, besides Zimmerman's case, of ever allowing an unauthorized person to go to work on a site. Tr. 934-36.

And just as the Company gave multiple, often inconsistent, directives to Robinson and Thomas to trip them up, it sat back and watched as Kerr sought approval for Zimmerman's return and then let Zimmerman go to work. In other words, just as Hall tried to set Robinson up, Hagedorn set up Kerr.

But the most striking similarity to these other cases are the final communications to Kerr and Zimmerman through letters vetted by lawyers and delivered on letterhead to the workers personally. The only other time the Company had done that was for Robinson and Thomas, the two workers whose concerted activity had clearly made them utterly "toxic". Tr. 984. None of the reams of other termination write-ups the Company presented looked like the ones Kerr, Zimmerman, Thomas, and Robinson received; in fact, none had even been directed to the affected workers. (R Exs. 14-23, 25-27, 32-37, 39-42). There is simply no explaining Trade Off's decision to so formally scrub and administer Kerr's and Zimmerman's discharges, including having them ready to hand out on January 9, unless one imputes that the Company knew they too had taken the Local 79 "bait".

3. Evidence of Summer Meetings

Last, the Region also showed that the Company was aware of Kerr's concerted activity in attending Local 79 meetings in the summer of 2017. The Company admits in its most recent verified state law complaint against the Union that it infiltrated informational meetings held by the Union over the summer. GC Ex. 44, par. 21; *see also* GC Ex. 35 (the Company literally referring to these efforts as an "infiltration"). And Kerr testified that he attended those meetings.

Tr. 763. The only real question posed by this basis for sustaining the unlawful discharges is why the Company would have then waited until January 2018 to fire Kerr, and why it would have included Zimmerman.

The short answer is that the Company was probably on the lookout through late summer and fall 2017 for more evidence of Kerr's interest in the Union. He was not an active dissident. But to be sure, it never gave him another foreman assignment after the summer meeting, and Kerr testified that Hagedorn became increasingly non-responsive at or around that time. Tr. 765. The Company's knowledge of the January apprentice recruitment was certainly established based on the fact that it admits to regularly monitoring the Local 79 Facebook page (Tr. 972-73), which ubiquitously featured announcements of the coming recruitment, including providing links to a detailed Department of Labor description of the application process. Tr. 750 (Tiburzi), 792 (Warrington). So when Kerr took time off on the morning of January 5, the Company had every reason to conclude—especially given the interest he had shown in Local 79 over the summer—that he was applying.

In other words, while the ALJ has overwhelming grounds on which to find that the Company surveilled the line of applicants on January 8, and/or to otherwise impute knowledge of the concerted activity based on the falsity of the Company's proffered rationales and the similarities of the Kerr/Zimmerman cases to other illegal discharges, the ALJ likewise has more than sufficient evidence to find that Hagedorn knew Kerr was pursuing the Local 79 path based just on the summer meetings and Union Facebook posts, which would then warrant the conclusion that he fired Zimmerman simply because of his association with Kerr.

The insidiousness of firing these two individuals merely because *they applied to a school*, explains the other anomaly that Hagedorn overruled Abadie to effectuate the firings. Abadie had

wanted to give Kerr a last warning, as shown in the management e-mail thread of GC Exhibit 45 (see also Hagedorn at Tr. 934)—but Hagedorn nonetheless fired them both. And he did so after speaking to Cesar and Abadie, again, after he sent the GC Exhibit 45 email. *See* Tr. 934 ("I spoke to Cesar then I spoke to Jason Abadie. Then I sent an e mail that I would handle it on Monday"). Clearly he knew something more he did not want to share by e-mail, i.e. that he suspected Kerr was "with 79" because of the summer meetings and the timing of his absence from the job on January 5. So he sat back and manufactured a violation of "protocol", which by January 9 had been cleared by lawyers and was ready for delivery in writing to the workers. By January 2018, Trade Off was becoming a little more sophisticated in the way it communicated and recorded its illegal firings, but nothing else had changed.

Hagedorn confirmed his suspicions about the two workers on January 8 when he sent managers to surveil the application line, but even if one wrongly leaves out *that* act of surveillance—it is clear Hagedorn already knew Kerr was "fringe" and fired him and his brother for it on January 9.

Based on any or all of these grounds, it is clear Trade Off illegally fired Larry Kerr and Willie Zimmerman.

CONCLUSION

For all of the foregoing reasons Local 79 respectfully requests that the ALJ issue a recommended order finding that Trade Off has violated the Act in all of the manners alleged in the Consolidated Complaint as amended.

Dated: February 12, 2019
New York, NY

By: _____

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